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The Legitimacy of Area-Based Restrictions to Maintain Public Order: Giving Content to the Proportionality Principle from a European Legal Perspective

1. Introduction

The Belgian and UK legislators provide the executive and the judge with increasing powers to maintain public order that restrict the freedom of movement of the individual. In Belgium, the maintenance of public order is primarily a competence of local administrative authorities, in particular the mayor. For example, a new Article 134*sexies* has been inserted in the Belgian New Municipality Act (NMA) which gives mayors the power to maintain public order by imposing a so-called "temporary prohibition of place"[2]. On this ground, a mayor can, in case of a public order disturbance or nuisance, prohibit the offender to enter a certain public place for up to one month[3].

Similar police powers were introduced in the United Kingdom by Part 3 of the Anti-social Behaviour, Crime and Policing Act 2014 (ACPA). This part provides constables in uniform with dispersal powers, enabling them to impose a "direction to leave" on a person who has engaged in, or is likely to engage in, problematic behaviour (i.e. anti-social behaviour, crime or disorder) in a certain public area[4]. This direction to leave comprises –

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2 This prohibition of place was already known in administrative law, but has been enshrined generally in a statutory text for the first time now. For a first analysis of this new temporary prohibition of place and its conditions, see, e.g. L. Todts, *Het gemeentelijk plaatsverbod: een eerste verkenning en toetsing aan het fundamentele recht op persoonlijke bewegingsvrijheid (The municipal prohibition of place: a first exploratory analysis and review of its compatibility with the fundamental right to freedom of movement)* (2015) 8 Tijdschrift voor Bestuurswetenschappen en Publiek Recht 432.

3 Art. 134*sexies*, § 2 NMA.

4 Similar police powers already existed under the 2003 Anti-social Behaviour Act (Part 4). However, the conditions of the new direction to leave are even less stringent, thus implying increased police discretion. For a brief comparison of the old and new dispersal powers, see, e.g. A. Millie, *Replacing the ASBO: An opportunity to stem the flow into the Criminal Justice System* [in:] *The Penal Landscape: The Howard League Guide*

besides the obligation to leave the area as such – the obligation not to return to that place, thus excluding the offender from that area[5]. However, the exclusion can only be applied for up to 48 hours, in contrast to one month in the case of the Belgian prohibition of place. It is important to note that the direction to leave obligates the offender *to leave* the locality and *not to return* to it, in contrast to the Belgian prohibition of place which only refers to the prohibition *to enter* the locality. Despite this difference, both measures have the same goal, namely maintaining public order by imposing *area-based restrictions*, in other words by prohibiting an individual to be in a certain public place for a certain period.

The above-mentioned techniques are not the only area-based restrictions that can be imposed in order to maintain public order. For instance, in Belgium and the United Kingdom, public officials or the judge, respectively, can impose on the individual a temporary prohibition to enter a football stadium in order to tackle football-related violence and disorder[6]. In both legal systems, the freedom of movement can also be limited with the aim of maintaining public order by a public transport ban imposed by civil servants or by the judge comprising the prohibition to use public transport[7].

The above trend of increased public order powers that restrict the individual in his or her free movement is unlikely to end soon. After all, at present, there is an increase in dangerous situations and situations of threat, such as terror threat, which might lead to an increase in public order powers. Moreover, the powers of judges and the executive to safeguard public order are not listed anywhere in a limited way so new forms of public order powers may be introduced. For instance, in Belgium, the introduction of the electronic tag is debated, imposed by the executive in order to fight radicalisation[8]. Similar freedom-restricting measures imposed in the fight against terrorism already exist in the United Kingdom.

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to Criminal Justice in England and Wales, A. Dockley, I. Loader (eds.), Routledge 2013, p. 79–81.

5 S.35(1) ACPA.

6 Art. 24 Wet 21 December 1998 betreffende de veiligheid bij voetbalwedstrijden (Belgian Security at Football Matches Act 1998) and Art. 14B Football Spectators Act 1989 (the so-called football banning order on complaint), resp.

7 Decreet 8 mei 2009 betreffende toegangsverbod tot voertuigen van de VVM (Flemish Transport Ban Decree 2009) and Part 1 ACPA, resp. It is important to point out that in the United Kingdom the maintenance of public order is primarily a competence of judges and not the (local) executive, which is – as mentioned above – the case in Belgium. However, this does not mean that judges in Belgium cannot impose public order solutions at all. For instance, in Belgium, a criminal judge can impose a judicial football stadium ban for football-related violence. Conversely, in the United Kingdom, public order solutions can also be imposed by the executive. The above-mentioned direction to leave, for example, is imposed by the executive, more specifically by a constable in uniform.

8 *Hand*, Kamer 2015-16, December 2, 2015, No. 7807, p. 26–27.

For example, the Secretary of State can impose the so-called "non-derogating control orders"[9] which have recently been replaced by errorism prevention and investigation measures or "TPIMs"[10]. These measures can contain exclusions from particular areas, with the possibility to monitor these exclusions via electronic tagging[11].

However, the above-mentioned public order powers constitute serious restrictions of our fundamental rights and freedoms, more specifically the right to freedom of movement as guaranteed in, inter alia, Article 2 of the Fourth Additional Protocol of the European Convention on Human Rights (FAP)[12]. This Article reads as follows:

> "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
> 2. Everyone shall be free to leave any country, including his own.
> 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
> 4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society".

For this contribution, I will only focus on the individual's right to move freely within the territory of a particular State, as enshrined in the first paragraph of Article 2 of the FAP and not the right of the individual to choose his/her residence or the right to leave a country, as guaranteed in paragraphs 1 and 2 of the Article[13].

The right to move freely within the territory of a particular State prohibits national authorities to *restrict* the individual's free movement in an arbitrary way. In addition, every individual also has the right not to arbitrarily lose all freedom of movement and thus not to be arbitrarily

9 The orders are called "non-derogating" since they do not derogate from Article 5 of the ECHR: they merely restrict the individual in his or her free movement instead of depriving the individual of all liberty (see D. Feldman, *Deprivation of liberty in anti-terrorism law* (2008) 67(1) C.L.J. 4, 4).

10 Sections 2 and 3 (1)(a) of the Prevention of Terrorism Act 2005, as repealed in 2011 by Section 1 of the Terrorism Prevention and Investigation Measures Act 2011.

11 Section 3(3); Schedule 1, Part 1, Section 3 and Section 29(1), resp. of the Terrorism Prevention and Investigation Measures Act 2011.

12 See also Article 13 of the Universal Declaration of Human Rights and Article 12 of the International Covenant on Civil and Political Rights.

13 Consequently – and given the only limited scope of this contribution – I will only focus on purely internal situations and neither the right to free movement between different EU States, as protected under EU law, nor the right to free movement of aliens in the context of migration law, will be profoundly discussed either.

deprived of his or her liberty, as guaranteed in the *right to liberty and security* anchored in, inter alia, Article 5 of the European Convention on Human Rights (ECHR)[14]. Thus, restraints of the individual's free movement can occur in various degrees, ranging from a mere restriction upon the free movement under Article 2 of the FAP to a more far-reaching deprivation of all liberty under Article 5 of the ECHR. As to area-based restrictions, they are generally considered to be mere limitations of the individual's free movement without depriving the individual of all liberty[15]. Consequently, this contribution focuses on Article 2 of the FAP and not on Article 5 of the ECHR.

It is important to point out that, according to the European Court of Human Rights (ECofHR) case law, the right to liberty of movement in Article of the 2 FAP must be clearly distinguished from the right to liberty and security in Article 5 of the ECHR. In *Austin*[16], the Strasbourg-based Court stated that the rights guaranteed under the ECHR – which are incorporated into UK domestic law by the Human Rights Act 1998 via the so-called Convention rights – and more specifically the right to liberty and security in Article 5 – may not be interpreted as (also) providing the requirements of the Fourth Additional Protocol as regards Contracting States to the ECHR who have not yet ratified this protocol[17], such as the United Kingdom[18]. Thus, UK citizens cannot bring claims for breaches of Article 2 of the FAP before national courts, since the United Kingdom has not ratified the Fourth Additional Protocol. In Belgium, on the contrary, an individual can bring a claim to a national court for breaches of Article 2 of the FAP itself, since Belgium did ratify the Fourth Additional Protocol which has direct effect in domestic law.

The freedom of movement is not only a fundamental right as such. It is also a fundamental precondition for the enjoyment of many other fundamental rights[19]. In this regard, the ECofHR has already held that restrictions of the

14 See also Article 3 of the Universal Declaration of Human Rights and Article 9 of the International Covenant on Civil and Political Rights.

15 See, e.g. *Landvreugd v the Netherlands* (2003) 36 E.H.R.R. 56 and *Olivieira v the Netherlands* (2003) 37 E.H.R.R. 32; 14 B.H.R.C. 96. *Cf. Van den Dungen v The Netherlands (App. No. 22838/93), Admissibility decision of 22 February 1995*, Decisions and Reports 1995-80A, p. 147–151. This has also been already confirmed by the Belgian Constitutional Court as regards the Belgian temporary prohibition of place (GwH April 23, 2015, No. 44/2015, para. B.62).

16 *Austin and others v United Kingdom* (2012) 55 E.H.R.R. 14.

17 *Ibid.*, para. 55.

18 However, it did sign it, so that the United Kingdom may not act contradictory to the object and the aim of the Protocol (Article 18 of the Vienna Convention of 23 May 1969 on the Law of Treaties).

19 According to the Human Rights Committee, the right to freedom of movement is an indispensable condition for the free development of a person (U.N. Doc CCPR/C/21/Rev 1/Add.9 (1999)).

right to freedom of movement may also interfere with *other* fundamental rights, such as the right to privacy in Article 8 of the ECHR[20]. Hence, UK citizens can bring claims before national courts for breaches of the right to freedom of movement based on other Convention rights, such as the right to privacy, but also, for example, the right to freedom of expression and the right to freedom of assembly and association as enshrined in Articles 10 and 11 of the ECHR, respectively, provided that the limitations on the free movement amount to limitations on any of these rights.

The question arises under what conditions measures imposed by national authorities to maintain public order restricting the individual's free movement within the territory of that State are compatible with the aforementioned fundamental rights and freedoms. This question is not an easy one to answer. After all, there is no clear and general assessment framework for such freedom-restricting public order powers, in particular at European human rights level. However, such a framework is essential to strike a good balance between the need to maintain public order and the protection of our fundamental rights and freedoms, especially the right to freedom of movement.

The lack of such a clear and general assessment framework at the European human rights level has two main causes. First, as discussed above, national authorities may not only have to take into account the requirements of Article 2 of the FAP but also of other fundamental rights, such as Articles 8, 10 and 11 of the ECHR as restrictions upon the free movement may interfere with these rights as well. To be in accordance with the right to freedom of movement – as guaranteed in Article 2 of the FAP or via other fundamental rights – the imposed measure must meet the standard restriction requirements as set by Article 2(3) of the FAP and Articles 8(2), 10(2) and 11(2) of the ECHR, respectively. These are, first, that the restriction must be "prescribed by law", i.e. having a basis in national law. Second, it must pursue a "legitimate aim", such as the maintenance of public order. Third, the restriction must be "necessary in a democratic society". To assess this necessity, the ECofHR has developed a number of criteria, including the condition that the restriction must respond to a "pressing social need" and that it must be "proportionate".

It is important to note that Article 2 of the FAP contains another ground for restriction in the fourth paragraph. This restriction ground – although only applicable in particular geographical areas – such as areas with a lot of drug trafficking[21] – already enables national authorities to restrict the freedom of movement when it is "justified by the public interest

20 *Iletmiş v Turkey* (2011) 52 E.H.R.R. 35.

21 Article 2(4) FAP. See, e.g. *Landvreugd v the Netherlands* (2003) 36 E.H.R.R. 56 and *Olivieira v the Netherlands* (2003) 37 E.H.R.R. 32; 14 B.H.R.C. 96.

in a democratic society"[22]. This seems to be less strict than the standard formula of "necessary in a democratic society" in the third paragraph. In this case, the measure does not have to respond to a "pressing social need"; it suffices that it is "not disproportionate"[23]. As a result, and regardless of whether the restriction ground in the third or fourth paragraph is applied, the measure must always be at least "proportionate"[24].

To date, only a small amount of the case law of the ECofHR exists on the compatibility of freedom-restricting public order powers with our fundamental rights and freedoms, especially the right to freedom of movement, so that the ECofHR's case law is of only limited help for establishing a clear and general assessment framework. That freedom-restricting public order powers, such as area-based restrictions, find a sufficient basis in the law and have a legitimate aim is not generally questioned[25]. The Belgian prohibition of place and the UK direction to leave both have a basis in national law[26]. In addition, given the fact that the legitimate aims mentioned in Article 2 of the FAP as well as Articles 8, 10 and 11 of the ECHR are interpreted broadly by the ECofHR[27], it can be assumed that both area-based restrictions pursue a legitimate aim, namely the maintenance of public order. After all, the prohibition of place and the direction to leave are imposed to tackle "public order disturbance and nuisance" and "anti-social behaviour, crime and disorder", respectively[28]. Therefore, the decisive criterion will be the requirement of being "necessary

22 The fourth paragraph was introduced to enable restrictions that, although serving the general interest, do not necessarily require a situation in which there is a disturbance of public order as well (B. Vermeulen, *Chapter 21. The Right to Liberty of Movement (Article 2 of Protocol No. 4)* [in:] P. Van Dijk, F. Van Hoof, A. Van Rijn, L. Zwaak (eds.), *Theory and practice of the European Convention on Human Rights*, Intersentia 2006, p. 944).

23 See, e.g. *Landvreugd*, fn. 22 above, para. 74 and and *Olivieira*, fn. 22 above, para. 65.

24 J. Schilder, J. Brouwer, *Recht op bewegingsvrijheid, kenbaarheidseis en voorzienbaarheidseis* (*The right to freedom of movement and the requirements of accessibility and foreseeability)* (2003) 15 AB Rechtspraak Bestuursrecht 16 and Ch. Grabenwarter, *European Convention on Human Rights. Commentary*, Beck 2014, p. 415.

25 N. Arenas Hidalgo, *Liberty of Movement Within the Territory of a State (Article 2 of Additional Protocol No. 4 ECHR)* [in:] *Europe of Rights: A Compendium on the European Convention of Human Right*, J. García Roca, P. Santolaya (eds.), Koninklijke Brill 2012, p. 622–623 and the references to the case law there.

26 I.e. the NMA (Article 134*sexies*) and the ACPA (part 3) for the prohibition of place and the direction to leave, respectively. This has already been confirmed by the Belgian Constitutional Court as regards the Belgian prohibition of place (see GwH April 23, 2015, No. 44/2015, paras. B.60.6-B.60.9).

27 J. Gerards, *EVRM: Algemene beginselen* (*ECHR: General principles*), Sdu Uitgevers 2011, p. 133.

28 That the Belgian prohibition of place pursues a legitimate aim (the aim of public order) has already been confirmed by the Belgian Constitutional Court (GwH April 23, 2015, No. 44/2015, para. B.60.7).

(or justified, according to Article 2(4) of the FAP) in a democratic society", or, in other words, being *proportionate*.

However, this proportionality requirement seems not to be the only one applicable to freedom-restricting public order powers under the Convention. That brings me to the second problem as to the assessment framework at the European human rights level. As will be shown below, another proportionality test seems to result at least implicitly from the ECofHR's case law with regard to the right to a court with full jurisdiction in Article 6 of the ECHR, provided that the measure imposed is to be considered as civil or criminal within the meaning of that Article.

As a result, the compatibility of freedom-restricting public order powers with our fundamental rights and freedoms is not a single and distinct problem, only relating to Article 2 of the FAP, especially not as regards the proportionality of such powers. These powers may also interfere with several other fundamental rights, such as Articles 8, 10 and 11 of the ECHR, but also Article 6 of the ECHR. The compatibility of these powers is thus a multi-faceted problem, relating to multiple fundamental rights and thus with several conditions that must be met, in particular with regard to the proportionality principle.

It is undisputable that the proportionality principle is applicable to freedom-restricting public order powers, such as area-based restrictions. Although neither the text of the Convention nor its Additional Protocols expressly refers to the proportionality principle, it is identified in the ECofHR's case law as a general principle of the Convention: it is "inherent in the whole of the Convention" and requires the ECofHR to search for "a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental right"[29]. In Belgium, the proportionality principle is a part of the unwritten general "principles of good administration" which the executive must take into account. In the United Kingdom, on the other hand, the proportionality principle is relatively new. It was incorporated into UK domestic law by the Human Rights Act 1998 via the Convention rights and only qualified as a general principle of public law in 2001[30].

The question arises how this proportionality principle must be *interpreted* and what the content of this principle is as regards freedom-restricting public order powers, such as area-based restrictions. This is especially true given the fact that such measures may interfere with various funda-

29 *Soering v UK* (1989) 11 EHRR 439, para. 89. See also, amongst others *Baumann v France* (2002) 34 E.H.R.R. 44, para. 61; *Hajlik v Hungary* (2008) 47 E.H.R.R. 11, para. 32; *Stamose v Bulgaria (App. No. 29713/05), judgement of November 27, 2012*, para. 32 and *Soltysyak v Russia* (2016) 62 E.H.R.R. 5, para. 48.

30 *Daly v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 A.C. 532. See also T. Hickman, The substance and structure of proportionality (2008) P.L. 694, 694.

mental rights, with various (proportionality) requirements that must be met, as discussed above. The aim of this contribution is thus to provide a first exploratory analysis of the criteria that must be taken into account by national authorities when imposing area-based restrictions, or by judges when assessing their legitimacy, for these measures to be proportionate and thus compliant with our fundamental rights and freedoms, in particular the right to freedom of movement.

Therefore, this contribution first focuses on identifying the nature of area-based restrictions, especially whether and to what extent they are civil and/or criminal for the purposes of Article 6 of the ECHR. Given the fact that today we have to comprehend the principle of proportionality primarily because it is part and parcel of the case law of the European Court of Justice and the ECofHR, the contribution then offers a very brief overview of the content of this principle as conceived of by these Courts before comparing it with the content of this principle at national level, more specifically Belgium and the United Kingdom. The domestic case law can offer leads as regards criteria that must be taken into account when considering the proportionality of freedom-restricting measures in the absence of a clear and general assessment framework at the European human rights level. The contribution first analyses whether and to what extent this interpretation has been implemented by the Belgian Council of State (this is the highest general administrative court in Belgium). The case law of the Council of State is an interesting case to examine since the Council applies a different proportionality test depending on the legal classification of the measure imposed. This is then followed by an analysis of the proportionality principle in UK case law[31]. The proportionality principle is a relative newcomer in the UK used instead of the traditional "Wednesbury unreasonableness" test[32] in cases that fall under the ECHR[33]. The contribution ends with some concluding remarks.

2. The nature of area-based restrictions: civil, criminal or both?

In the ECofHR's case law, a distinction is made based on Article 6(1) of the ECHR between measures which are punitive in purpose (the so-called "criminal charges") and those with a more preventive object. When considering whether the measure imposed is punitive or not for the purposes of Article 6, the ECofHR applies autonomous interpretation, involving a number of criteria of which the domestic legal classification is the starting

31 References in this contribution to the United Kingdom should be read as comprising (only) England and Wales.

32 A. Davies, J. Williams, *Proportionality in English Law* [in:] *The Judge and the Proportionate Use of Discretion*, S. Ranchordás, B. de Waard (eds.), Routledge 2015, p. 73.

33 A.D.P. Brady, *Proportionality and Deference Under the UK Human Rights Act: An Institutionally Sensitive Approach*, CUP 2012, p. 6.

point, though not the most decisive. More important is the nature of the measure, in particular whether or not the measure has a punitive purpose[34]. For instance, the area-based restrictions contested in *Landvreugd* and *Olivieira*[35], both imposed to tackle the traffic in and the use of hard drugs in a public place, were treated as preventive and thus non-criminal measures, because they were imposed for the "maintenance of public order and the prevention of crime"[36]. This distinction is important. Only if the measure imposed is to be regarded as criminal within the meaning of Article 6, is the individual entitled to the procedural protections guaranteed in that Article, such as the right to a court with full jurisdiction.

It is important to note that the above distinction is not the only one made in the ECofHR's case law. After all, Article 6 of the ECHR is not only applicable to criminal matters, but also to measures involving the determination of a civil right or obligation, though certain procedural safeguards specified are only applicable to criminal matters. Whether or not the measure imposed involves the determination of a civil right or obligation is also interpreted autonomously by the ECofHR on the basis of a number of criteria. Again, the domestic legal classification of the right concerned is not conclusive. According to the ECofHR's case law, the content and effects of the right under the domestic law will be of particular importance[37]. One can wonder whether a measure restricting the right to freedom of movement implies the determination of a civil right as well. To my knowledge, this question has not yet arisen before the ECofHR. However, in my opinion, this might be possible, especially when the freedom-restricting measure has repercussions on other, civil rights, such as the individual's private life in Article 8 of the ECHR[38].

The Belgian Council of State does not expressly refer to Article 6 of the ECHR to distinguish between public order powers with a punitive or criminal purpose and those which are more preventive. However, it does take into account the purpose of the measure contested. In Belgium, the purpose of the measure is important since it brings along a different legal classification of that measure. In general, two categories of public order powers are distinguished in Belgian administrative law, depending on their

34 *Lauko v Slovakia*, Application 26138/95 (2001) 33 E.H.R.R. 40, paras. 56–57; Öztürk v Germany, Series A No. 73 (1984) 6 E.H.R.R. 409, para. 50 and *Engel and others v The Netherlands*, Series A. No. 22 (1979-80) 1 E.H.R.R. 647, para. 82.

35 *Landvreugd*, fn. 22 above and *Olivieira*, fn. 22 above.

36 *Landvreugd*, fn. 22 above, para. 68 and *Olivieira*, fn. 22 above, para. 61. As already pointed out by Lord Bingham of Cornhill in *Secretary of State for the Home Department v MB* [2007] UKHL 46, para. 23.

37 See http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf (Accessed on 27 July 2016), p. 6–13.

38 Cf. *Alexandre v Portugal (App. No. 33197), judgement of 20 November 2012*, paras. 51 and 54. See also http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf (Accessed on 27 July 2016), p. 11.

purpose. First, public order powers can be imposed as an "administrative sanction", which aims to punish the offender for the offences he or she committed, thus reacting to past actions. Second, these powers can also be imposed as an "administrative measure" (the so-called "police measure"), which is more preventive in nature and does not aim to punish the offender for past actions but to safeguard public order[39]. Therefore, it is not necessary that an offence has already been committed.

The Belgian legislator has clearly qualified the prohibition of place as a police measure since the prohibition is being imposed "to safeguard public order"[40], without the necessity of an offence that has already been committed. Thus, the prohibition of place mainly aims to maintain public order instead of punishing the offender for past actions[41]. This legal classification was questioned before the Belgian Constitutional Court by the "Human Rights League" – this is a non-governmental organisation that aims to tackle injustices and any attack on the individual's fundamental rights and freedoms – but the Court confirmed this classification[42].

However, this does not prevent the Council of State from deciding in a particular case that the contested prohibition of place is in reality imposed as an administrative sanction since it aims to hurt the offender for the infringements that he or she committed in a certain public area. Moreover, the imposed prohibition of place may be so punitive in nature that it must be regarded as a criminal charge, in line with the above-mentioned ECofHR's case law. Merely preventive prohibitions of place are not likely to be regarded as criminal for the purposes of Article 6 of the ECHR since they are not punitive in nature. However, the prohibition of place does not need to be considered as criminal in order to fall within the ambit of Article 6. After all, it may be possible that the Council of State considers in a particular case that the imposed prohibition must be regarded as civil within the meaning of Article 6, as discussed above, thus coming within the scope of that Article.

Contrary to Belgium, the United Kingdom does not formally acknowledge the distinction between "administrative sanctions" and "preventive measures" with regard to the legal classification of public order powers, depending on the nature of the imposed technique[43]. In general, in the

39 RvS 8 May 2014, No. 227.331, BVBA Wedwinkel, para. 20; RvS 15 May 2014, No. 227.421, BVBA Buka 2000, para. 7 and RvS 29 July 2014, No. 228.130, BVBA HS-Trading, para. 8. See also adv.RvS, *Parl.St.* Kamer 2012-13, No. 53-2712/001, p. 61–62.

40 Art. 134*sexies*, § 1 NMA.

41 See also Memorie van toelichting, *Parl.St.* Kamer 2012-13, No. 53-2712/001, p. 5 and 28.

42 GwH April 23, 2015, No. 44/2015, paras. B.57.7–B.57.8.

43 This does not mean that administrative sanctions do not exist in the United Kingdom; see, e.g. Part 3 of the Regulatory Enforcement and Sanctions Act 2008, enabling regulatory bodies to impose administrative sanctions for regulatory breaches.

United Kingdom, techniques to tackle problematic behaviour are considered to be *civil* orders, i.e. ones where the nature of the proceedings followed by the competent authority is civil and not criminal since it is not necessary that a crime has been committed[44]. The new direction to leave, for instance, must be regarded as civil, since the imposition of it does not require a criminal offence[45]. Moreover, an offence is not even necessary at all. The direction to leave can already be imposed when problematic behaviour is *likely to be committed*, without the requirement of problematic behaviour that has already been committed, criminal or not[46]. Consequently, the direction to leave can be regarded as a civil order with a more preventive purpose, primarily aiming at tackling future problematic behaviour instead of sanctioning an individual for past actions[47]. It is important to note, however, that this does not mean that the direction to leave cannot be imposed as a reaction to the individual's past actions. After all, section 35(2) of the ACPA also refers to the possibility to impose the direction in attempts to tackle problematic behaviour to which the individual *has already contributed*.

However, this domestic legal classification as civil, i.e. not criminal, is not conclusive. It appears from UK case law that the domestic courts, referring to the ECofHR's case law concerning Article 6 of the ECHR, increasingly take into account the nature of the measure imposed[48] in order to appropriately classify that measure as criminal or not within the meaning of Article 6[49]. Thus, the primarily civil, i.e. non-criminal, domestic legal classification of the direction to leave does not prevent the UK courts

However, it is still a developing field and a clear distinction between criminal and administrative sanctions has yet to emerge (see, e.g. J. McEldowney, *Country analysis – United Kingdom* [in:] O. Jansen, *Administrative Sanctions in the European Union*, Intersentia 2013), p. 585). Nevertheless, given the fact that these administrative sanctions are not primarily imposed to maintain public order as such, they fall outside the scope of this contribution.

44 Note that, in the United Kingdom, the notion "civil" is conceived of rather as "not criminal", whereas in continental legal systems, such as Belgium, it is rather conceived of as the opposite of "administrative".

45 See Article 35(2) of the ACPA.

46 *Ibid*.

47 A. Crawford, *Dispersal Powers and the Symbolic Role of Anti-Social Behaviour Legislation* (2008) 71(5) MLR 753, p. 777. Although Crawford's contribution relates to the old dispersal powers, the same reasoning can be applied to the new direction to leave since both orders can already be imposed when problematic behaviour is *likely* to be committed (s. 30(3) 2003 Act and s. 35(2) 2014 Act, resp.).

48 As already stated in *Secretary of State for the Home Department v MB* [2007] UKHL 46, para. 23.

49 For instance, the above-mentioned football banning orders on complaint (*Gough and Smith v Chief Constable of Derbyshire* [2002] Q.B. 1213, para. 89) are considered to be non-criminal within the meaning of Article 6 of the ECHR. The same applies to the former non-derogating control orders (see *Secretary of State for the Home Department v MB* [2007] UKHL 46, para. 24).

from considering in a particular case that the imposed direction must be regarded as a criminal charge, in line with the ECofHR's case law.

In addition, the UK courts must also take into account, in the light of Article 6, the distinction between civil and non-civil matters. The fact that the direction to leave is considered to be civil under domestic law is a starting point, but not conclusive, as discussed above. Nevertheless, it might be possible that the direction to leave must be regarded as civil within the meaning of Article 6 of the ECHR, especially when interfering with other, civil rights, such as the right to private life. This has already been confirmed in UK case law as to other freedom-restricting public order powers. In *McCann*, for instance, concerning the former anti-social behaviour orders and more specifically, amongst others, the order prohibiting the individual to be in a certain area for a certain period[50], Lord Hope stated the following: "Although the jurisprudence of the ECofHR appears to me as yet to be unclear on this point, I would hold that **the fact that prohibitions** made under section 1(6) of [the Crime and Disorder Act 1998] **may have this effect [i.e. interfering with, amongst others, the individual's private life] is sufficient to attract the right to a fair trial which is guaranteed by Article 6(1)**" (emphasis added)[51].

As a result, as the above indicates, it is likely that freedom-restricting public order powers must be considered as civil within the meaning of Article 6 of the ECHR, especially when these powers interfere with other, civil rights, such as the right to private life in Article 8 of the ECHR. In other cases, though, these powers may be classified as (also) criminal for the purposes of Article 6 and not (only) civil.

3. The proportionality of area-based restrictions

3.1. The proportionality principle at European level

At European level, the European Court of Justice usually applies a strict structure when assessing whether the proportionality principle has been violated, consisting of the following three questions[52]:

50 Anti-social behaviour orders or ASBO's were civil orders comprising certain prohibitions or obligations imposed by the court in order to stop problematic behaviour, such as the prohibition to return to a certain area. They were introduced by the Crime and Disorder Act 1998 and were superseded by the "Injunction" and the "criminal behaviour order", both introduced by the ACPA 2014.

51 *McCann v Crown Court at Manchester* [2002] UKHL 39; [2003] 1 A.C. 787, para. 80. See, in the same sense, as to the former non-derogating control orders: *Secretary of State for the Home Department v MB* [2007] UKHL 46, para. 24 (Lord Bingham of Cornhill) cf., para. 79 (Lord Carswell).

52 See, e.g. R. Widdershoven, M. Remac, *General principles of law in administrative law under European influence* (2012) European Review of Private Law 391–392 and C. Haguenau-Moizard, Y. Sanchez, *The principle of proportionality in European law* [in:]

– Is the measure *necessary* to achieve the pursued legitimate aim?
– Is the measure *suitable* and thus able to achieve the aim pursued?
– Is the measure *proportionate in the strict sense*? This means that the disadvantages caused by the measure to the interests of the individual(s) concerned must not be disproportionate to the aim pursued.

A similar proportionality review seems to be underlying the case law of the European Court of Human Rights as well. When analysing the proportionality of measures restricting the individual's fundamental rights, the ECofHR considers the following three criteria[53]:
– The restriction must be *necessary* to attain the aim pursued;
– The restriction must be relevant and sufficient and thus *suitable* in order to achieve the aim pursued;
– The restriction must be *proportionate in the strict sense*. This means that the severity of the restriction on the individual's fundamental rights must stand in fair proportion to the importance of the legitimate aim pursued.

However, the content of the proportionality principle in the ECofHR's case law is not always clear-cut because the ECofHR does not systematically apply these criteria in each case and even if the criteria are applied, they are hardly ever examined separately. In addition, these criteria also differ in their relative importance. With regard to freedom-restricting measures, neither the necessity nor the suitability criterion is often used when analysing the proportionality of that measure[54]. Therefore, it can be tentatively stated that these criteria seem to be of less importance. For instance, in the above-mentioned cases *Landvreugd* and *Olivieira*, the ECofHR referred to neither of the criteria. However, as to the necessity criterion, this can be explained by the fact that freedom-restricting measures are already possible when "justified in a democratic society", according to the fourth paragraph of Article 2 of the FAP. This only requires the measure to be proportionate, without the necessity of responding to a pressing social need as well[55]. In *Landvreugd* and *Olivieira*, for example, the ECofHR applied the fourth paragraph of Article 2 of the FAP and it only assessed whether the

S. Ranchordás, B. de Waard, *The Judge…*, p. 153–154 and the references to the case law there.

53 For a more extended discussion, see e.g. *Gerards, EVRM: Algemene beginselen*, fn. 28 above, p. 140–157; Y. Arai-Takahashi, *Proportionality* [in:] *The Oxford Handbook of International Human Rights Law*, Dinah Shelton (ed.), OUP 2013, p. 451; *Jacobs, White and Ovey. The European Convention on Human Rights*, B. Rainey, E. Wicks, C. Ovey (eds.), OUP, 2014, p. 324–325 and T. Harbo, *The Function of Proportionality Analysis in European Law*, Brill Nijhoff 2015, p. 71–80 and the references to the case law there.

54 *Hidalgo, "Liberty of Movement Within the Territory of a State"*, fn. 26 above, p. 622.

55 See *supra*.

restriction complained of was "not disproportionate", without examining whether there was a "pressing social need" [56].

The most used criterion of the proportionality test in the ECofHR's case law as to freedom-restricting measures is the requirement of proportionality in the strict sense[57]. According to Hidalgo, the ECofHR has often limited its proportionality review to only this third element[58]. In *Landvreugd*, for example, the ECofHR refers to the third criterion – and only to this criterion – when taking into account the fact that the applicant had already been banned from the area concerned for overt use of hard drugs and that he totally ignored the ban, whereupon he was informed of the consequences thereof and concluded that "**in these circumstances**, the Court finds that **the restriction on the applicant's freedom of movement cannot be regarded as disproportionate**" (emphasis added)[59].

It is in the third element of the proportionality test that the required "fair balance", as mentioned above, is clearly present. The restriction of the fundamental right caused by the measure imposed must stand in fair proportion to the importance of the legitimate aim pursued by the measure, which requires balancing means and ends[60]. Consequently, the proportionality test used in the ECofHR's case law is often referred to as an "aims-means" balance. However, as is apparent from the above, the third element does not only require the means being balanced with the aim pursued but also the means being balanced with the *consequences* of the means for the individual, more specifically the impact caused on his or her fundamental rights and freedoms. The third element of the proportionality test compares the consequences of the measure for the individual's rights (the "costs") with the contribution of the measure to the attainment of the aim pursued (the "benefits"). In *Landvreugd*, for instance, the ECofHR took into account the consequences of the imposed area-based restriction on the applicant's personal circumstances, when considering that the applicant did not live or work in the prohibited area and that certain provisions had been made so that he could enter the prohibited area to collect, amongst others, his mail[61]. It is thus more correct to say that the proportionality test at the

56 *Landvreugd*, fn. 22 above, paras. 67–75 and *Olivieira,* fn. 22 above, paras. 60–66.

57 As already stated by Hidalgo in *Hidalgo, "Liberty of Movement Within the Territory of a State"*, fn. 26 above, p. 622. See also *Arai-Takahashi, "Proportionality"*, fn. 54 above, p. 454–455.

58 *Hidalgo, "Liberty of Movement Within the Territory of a State"*, fn. 26 above, p. 622.

59 See *Landvreugd*, fn. 22 above, paras. 72 and 74. See, in the same sense, *Olivieira*, fn. 22 above, para. 65.

60 See, e.g. *Gerards*, *EVRM: Algemene beginselen*, fn. 28 above, p. 158 and *Arai-Takahashi, "Proportionality"*, fn. 54 above, p. 452.

61 *Landvreugd*, fn. 22 above, para. 72. See, in the same sense, *Olivieira*, fn. 22 above, para. 65.

European human rights level constitutes an "aims-means-consequences" balance instead of only an "aims-means" balance[62].

However, national authorities must not only take into account the right to freedom of movement in Article 2 of the FAP or via the conditional rights in Articles 8, 10 and 11 of the ECHR, when assessing the proportionality of freedom-restricting measures, such as area-based restrictions. If the area-based restriction is to be considered as a criminal charge or as civil for the purposes of Article 6 of the ECHR, it must also meet the requirements resulting from that Article. As mentioned above, these requirements primarily constitute procedural protections, such as the right to a court with full jurisdiction. Article 6 does not comprise any substantive safeguards, let alone an independent proportionality test.

Despite this absence of an independent proportionality test in Article 6 of the ECHR, it appears from the ECofHR's case law that this Article might yet have an effect, albeit indirectly, on the content of the proportionality principle. This indirect effect can be derived from the ECofHR's case law with regard to the right to a court with full jurisdiction, which is a procedural safeguard resulting from Article 6(1) of the ECHR and which is applicable to both criminal and civil matters within the meaning of that Article. This right requires in general that the domestic court has the competence to examine the case on points of facts and law[63].

However, it appears from the ECofHR's case law that it also demands the domestic court to be able to assess the *proportionality* of the measure imposed. For instance, the ECofHR referred to the proportionality principle when considering that the requirement of full jurisdiction includes "review of the facts and **assessment of the proportionality between the fault and the sanction**" (emphasis added)[64] and the "competence to examine the case on points of fact and law as well as the **power to assess the proportionality of the penalty to the misconduct**" (emphasis added)[65]. In addition, it can be observed from the above case law that the requirement of full jurisdiction not only requires the power for the domestic court to assess the proportionality of the measure as such. This requirement also has implications for the

62 As already stated by Barak in A. Barak, *Proportionality, constitutional rights and their limitations*, CUP 2012, p. 132.

63 See, e.g. *Le Compte, Van Leuven and De Meyere v Belgium* (1982) 4 E.H.R.R. 1, para. 51(b), as confirmed in, e.g. *Terra Woningen BV v the Netherlands* (1997) 24 E.H.R.R. 456, para. 52 and *Hummatov v Azerbaijan* (2009) 49 E.H.R.R. 36, para. 142. See also http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf (Accessed on 27 July 2016), p. 21–23.

64 *Albert and Le Compte v Belgium* (1983) 5 E.H.R.R. 533, para. 36 (civil case). See, in the same sense, *Le Compte, Van Leuven and De Meyere v Belgium* (1982) 4 E.H.R.R. 1, para. 51(b) (civil case); *Diennet v France* (1996) 21 E.H.R.R. 554, para. 34 (civil case) and *Merigaud v France (App. No. 32976/04), decision of 24 September 2009*, para. 69 (criminal charge).

65 *Hummatov v Azerbaijan* (2009) 49 E.H.R.R. 36, para. 142 (criminal charge).

content of the proportionality test. It can be tentatively stated that, as is apparent from the above case law, the requirement of full jurisdiction seems to demand, at least implicitly, the power for the domestic court to consider the proportionality between the individual's misbehaviour, i.e. the facts, and the measure imposed[66], thus implying a "means-facts" test.

It is important to note that this "means-facts" test would be applicable to both criminal and civil matters within the meaning of Article 6 of the ECHR. After all, this test can be derived from the ECofHR's case law with regard to the right to a court with full jurisdiction, which is applicable to both criminal and civil cases. The ECofHR refers, albeit implicitly, to this "means-facts" test in both criminal and civil matters within the meaning of Article 6 of the ECHR[67].

Two remarks should be made here. First, the above analysis indicates that it is of great importance for national authorities to take into account the nature of the imposed area-based restriction and to ascertain whether it is to be regarded as civil and/or criminal within the meaning of Article 6 of the ECHR. If this is the case, national authorities must also take into account the requirements of this Article, which presumably imply the application of a "means-facts" test. Second, national authorities must also be aware that, and regardless of the civil and/or criminal nature of the area-based restriction imposed, the measure still involves a restriction of the freedom of movement, as guaranteed in Article 2 of the FAP or via other fundamental rights, so that it must also meet the aforementioned "aims-means-consequences" test.

Therefore, it appears not to be an either-or story, in which national authorities must apply *either* the "aims-means-consequences" test *or* the criminal "means-facts" test. These tests are to be applied simultaneously, insofar as the freedom-restricting measure is to be considered as civil and/or criminal in view of Article 6 of the ECHR. Subsequently, it can be tentatively stated that, according to the ECofHR's case law, national authorities are faced with not one but multiple proportionality tests that should be applied at the same time, given the fact that freedom-restricting measures may interfere with various fundamental rights. However, the ECofHR's case law is still not explicit on this point and it remains indistinct as to whether national authorities must take into account the nature of the measure imposed in order to apply the "means-facts" test and whether this test is to be applied simultaneously with the "aims-means-consequences" test.

66 As already stated by M.L. van Emmerik, C.M. Saris, *Evenredige bestuurlijke boetes* (*Proportionate administrative fines*), www.stibbe.com (Accessed on 27 July 2016), p. 135.

67 See, e.g. *Albert and Le Compte v Belgium* (1983) 5 E.H.R.R. 533, para. 36 (civil case); *Diennet v France* (1996) 21 E.H.R.R. 554, para. 34 (civil case); *Merigaud v France (App. No. 32976/04), decision of 24 September 2009*, para. 69 (criminal charge) and *Hummatov v Azerbaijan* (2009) 49 E.H.R.R. 36, para. 142 (criminal charge).

We turn now to the proportionality principle in the Belgian Council of State's case law, in an attempt to find leads for tackling the above lack of clarity at the European human rights level.

3.2. The proportionality principle in the Belgian Council of State's case law

To be in accordance with Article 2 of the FAP, a temporary prohibition of place must be *proportionate*, as discussed above. Although this is not expressly required by Article 134*sexies* of the NMA, it also stems from the proportionality principle as a part of the Belgian unwritten general "principles of good administration", which the executive must take into account. There is no relevant case law with regard to the temporary prohibition of place yet. However, it can be derived from the Council of State's established case law concerning public order powers that the proportionality principle must be assessed in a different way, depending on the legal classification of the measure imposed. It is thus necessary to make a distinction between the proportionality test regarding police measures and the test as regards administrative sanctions. Since the prohibition of place is to be considered as a police measure[68], this article analyses the proportionality review for police measures. It proceeds with analysing the proportionality test concerning administrative sanctions.

3.2.1. Temporary prohibition of place as a police measure

In its case law, the Council of State emphasises the fact that the aim of police measures is to maintain public order. For this reason, a police measure is a *preventive* measure and not an administrative sanction, regardless of the fact that the measure may entail a disadvantage to the person concerned[69]. The fact that the measure harms the individual does not *per se* turn it into a disproportionate one. What is decisive for the proportionality test of police measures is thus not the harm caused to the individual, but what is necessary to achieve the pursued aim, i.e. maintaining public order[70].

The Council of State usually examines two preliminary questions to consider whether the imposed police measure is proportionate. It first analyses whether there is a specific need to maintain public order[71]. Subsequently, the Council of State examines whether the imposed measure is adapted to the specific need to maintain public order. Therefore, it mostly considers

68 See *supra*.

69 RvS 15 May 2014, No. 227.421, para. 7 and RvS 29 July 2014, No. 228.130, para. 8.

70 RvS 15 May 2014, No. 227.421, paras. 15–16 and RvS 29 July 2014, No. 228.130, paras. 11–12.

71 See, e.g. RvS 26 June 2013, No. 224.084; RvS 13 December 2012, No. 221.751; RvS 2 December 2010, No. 209.414 and RvS 9 November 2009, No. 197.670.

the following three questions, which are also present in the ECofHR's case law, as discussed above[72]:

- Is the measure *necessary* to counter the public order disturbance?
- Is the measure *useful* to counter the public order disturbance?
- Are the *disadvantages* for the individual caused by the measure *proportionate to the seriousness of the public order disturbance* which the executive wishes to counter? This requires a fair balance between the consequences of the measure for the individual and the benefits of it for the attainment of the pursued aim, i.e. the reduction in public order disturbance (also called "proportionality *sensu stricto*").

Following these three steps, the Council of State balances the aim of maintaining public order and the measure used to pursue this aim (the police measure), thus balancing *means* and *ends*. In addition, it appears from the last element of the proportionality test above that the Council also takes into account the *consequences* of the measure for the individual, although it will not be a decisive element, as mentioned above.

However, the Council of State does not always follow this three-step method. Especially with regard to restrictions of the right to free trade caused by a local regulation or by an individual decision based on a local regulation, the Council seems to apply these three questions[73]. In cases not primarily concerning the freedom of trade, the Council of State limits its review to the question whether the imposed measure "does not go further than necessary from a viewpoint of maintaining public order"[74]. This means that the imposed measure may not cause more harm to the individual than necessary for the attainment of the pursued aim, thus also balancing the *means* and *ends* against the means and their *consequences* for the individual.

For example, the Belgian prohibition of place is to be primarily understood as a restriction of the right to freedom of movement and not the right to free trade. By consequence, it may be possible that the Council of State will not apply the three above-mentioned questions, but will only assess whether the imposed prohibition stands in fair proportion to the public order aim (i.e. tackling the public order disturbance in the area concerned),

72 See, e.g. RvS 9 November 2009, No. 197.670; RvS 19 February 2002, No. 103.730; RvS 24 October 2000, No. 90.369 and RvS 7 December 1999, No. 83.940. For further discussion and references, see L. Todts, *Het evenredigheidsbeginsel bij administratieve sancties en politiemaatregelen: de ene evenredigheid is de andere niet?* (*The principle of proportionality with regard to administrative sanctions and police measures: one proportionality is not the other?*) (2015) 4 Tijdschrift voor Gemeenterecht 286, p. 289–290.

73 See e.g. RvS 9 November 2009, No. 197.670; RvS 19 February 2002, No. 103.730; RvS 4 October 2000, No. 90.369 and RvS 7 December 1999, No. 83.940.

74 RvS 29 July 2014, No. 228.130, para. 12 and RvS 15 May 2014, No. 227.421, para. 15.

taking into account the consequences of the prohibition for the individual's free movement, albeit not as a conclusive element.

The above indicates that the proportionality test applied by the Council of State to police measures – and regardless of whether it applies the three-step method or limits its analysis to the question of whether the measure does not go any further than necessary to maintain public order – clearly constitutes an "aims-means-consequences" test, which is also apparent in the ECofHR's case law with regard to freedom-restricting public order powers (supra).

3.2.2. Temporary prohibition of place as an administrative sanction

It is conceivable that, in a specific case, the Council of State considers that the imposed prohibition of place is, given the specific circumstances of that case, imposed as an administrative sanction and not as a mere police measure[75]. Administrative sanctions are, as stated above, to be considered as a punishment imposed in order to hurt the offender for the infringement that he or she committed. This has important implications with regard to the proportionality test. In its case law, the Council of State has frequently confirmed that it is because of the fact that the imposed administrative sanction essentially constitutes a punishment for the infringement of a local regulation that the proportionality test may not be interpreted as whether or not the imposed measure goes beyond what is necessary to stop the public order disturbance, in contrast to the proportionality test for police measures. To be proportionate, the administrative sanction must stand in fair proportion to the severity of the facts committed, i.e. the infringement[76]. Thus, as an administrative sanction, the prohibition of place must be proportionate to the *facts* for which it is applied.

The interpretation of the proportionality test as being a reasonable proportion between the imposed sanction and the facts, in other words a "means-facts" test, is not new. It is the traditional interpretation of the proportionality principle given by the Council of State, as developed in disciplinary law[77]. This interpretation in turn originates from the proportionality test as it has been developed in domestic criminal law: the criminal sanction applied must stand in fair proportion to the severity of the facts, i.e. the criminal behaviour committed[78]. The interpretation of the proportionality principle as regards administrative sanctions is thus more in line

75 *Supra*.

76 RvS 8 May 2014, No. 227.331, para. 13.

77 When applying a disciplinary sanction, the disciplinary authority must strike a fair balance between the facts and the disciplinary sanction applied (see e.g. I. Opdebeek, A. Coolsaet, *Algemene beginselen van ambtenarentuchtrecht (General principles of civil servants disciplinary law*), die Keure 2011, p. 86 and 214–234.

78 V. Vannes, *Titre III – L'émergence de la proportionnalité dans le droit actuel* [in:] V. Vannes (ed.), *Le droit de grève. Concilier le droit de grève et les autres droits fondamentaux: recours au principe de proportionnalité?*, Larcier 2014, p. 57–60.

with the concept of proportionality in criminal matters than the administrative concept applied to police measures.

The above analysis reveals that the Council of State applies a different proportionality test depending on whether the measure imposed is preventive in nature or has a more punitive purpose. It can be argued that this distinction is in line with Article 6 of the ECHR. After all, this Article also seems to require a distinction between punitive measures (i.e. criminal charges) and those which are more preventive in nature and to apply the criminal "means-facts" to only criminal charges and not to preventive measures. As to the Belgian prohibition of place, for example, which is classified by the legislator as a police measure, the Council of State (or a mayor when imposing it) will have to apply the "aims-means-consequences" test, resulting from its merely preventive classification at national level, but also from its freedom-restricting nature in view of Article 2 of the FAP. However, it is not unconceivable that it is in reality imposed as an administrative sanction, or even as a criminal charge in line with the ECofHR's case law, in both cases resulting in the application of the criminal "means-facts" test.

Two remarks are due here. First, assessing the proportionality of freedom-restricting public order powers, such as the Belgian prohibition of place, does not only seem to require a distinction between punitive measures and those which have a more preventive purpose. Another distinction has to be made in view of Article 6 of the ECHR, namely whether or not the measure concerned implies the determination of a civil right or obligation within the meaning of that Article. After all, as can be derived from UK case law as discussed above, such freedom-restricting measures are likely to be considered as civil for the purposes of Article 6 of the ECHR. So, even if the prohibition of place is in principle a preventive measure and not a punitive one (under domestic law or within the meaning of Article 6) and thus not leading to the application of the criminal "means-facts" test, this may still be the case, more specifically via its potential classification as civil in view of Article 6. In this case, the (preventive) prohibition of place must meet the criminal "means-facts" test as well since this test is also applicable to civil matters, as discussed above.

Conversely, if the Belgian prohibition of place is in reality imposed as an administrative sanction, or even as a criminal charge in line with the ECofHR's case law, the Council of State, or a mayor when imposing it, will have to apply the criminal "means-facts" test resulting from the domestic case law as well as, or at least implicitly, from the ECofHR's case law with regard to Article 6 of the ECHR. This will, however, not suffice. Area-based restrictions, such as the prohibition of place, are also measures interfering with the right to free movement, so that the "aims-means-consequences" test resulting from Article 2 of the FAP or via other fundamental rights must also be applied at the same time.

This brings me to the second remark. The above indicates that, as regards area-based restrictions, national authorities are not only faced with multiple proportionality tests at the European human rights level, stemming from the right to freedom of movement in Article 2 of the FAP or via other fundamental rights and as (likely) resulting from Article 6 of the ECHR. They are also confronted with various proportionality tests due to the multi-level legal framework in which they act, i.e. the domestic *and* European level.

We turn now to the proportionality principle in UK case law.

3.2.3. The proportionality principle in UK case law

When the State imposes a measure that restricts the individual in his or her Convention rights, for instance by imposing a direction to leave, this measure must meet the proportionality test adopted by the ECofHR and further developed by the UK courts[79]. Although Section 35 of the ACPA does not expressly refer to the proportionality principle, it does require the constable who imposes a direction to leave to ascertain that giving the direction is "necessary for the purpose of removing or reducing the likelihood of the problematic behaviour"[80]. This indicates that the aim for which the direction is imposed will be of particular importance with regard to its proportionality. However, there is no relevant case law concerning the proportionality of the new direction to leave yet, so we must fall back upon the already existing UK case law with regard to the proportionality of other freedom-restricting measures imposed to maintain public order.

In *Gough*, for instance, concerning a football banning order on complaint, the domestic court applied the proportionality test used in *de Freitas*[81] (the so-called "de Freitas"-test) to analyse the proportionality of the ban imposed, which comprises the following three questions[82]:

- Does the measure have a *legitimate aim,* meaning that the aim pursued is sufficiently important to justify interference with a fundamental right?
- Is the measure that has been designed to meet the aim *rationally connected* to it?
- Does the measure go no further than is *necessary* to achieve the aim, which is generally understood as the requirement for the competent authority to impose the measure which is the least intrusive for attaining the aim pursued[83]?

79 C. O'Cinneide, Human Rights and the UK Constitution [in:] J. Jowell, D. Oliver, C. O'Cinneide, *The Changing Constitution*, 8th ed., OUP 2015, p. 94.

80 S.35(3) of the ACPA.

81 *De Freitas v Permanent Secretary of Ministry of Agriculture* [1999] 1 A.C. 69.

82 *Gough and Smith v Chief Constable of Derbyshire* [2002] Q.B. 1213, para. 63. See also *Hickman, "The substance and structure of proportionality"*, fn. 31 above, p. 701.

83 See e.g. *Samaroo v Secretary of State for the Home Department* [2001] EWCA Civ 1139, para. 20. See also *Hickman, "The substance and structure of proportionality"*, fn. 31 above, p. 701 and G. Pearson, *Qualifying for Europe? The legitimacy of Football*

The "de Freitas"-test was approved in the joint opinion of the Appellate Committee in the *Huang* case[84] as well as by the House of Lords in other cases[85]. As a result, this test must be regarded as the firmly established proportionality test in UK domestic law, at least in respect of the Convention rights[86]. However, the following question was added in *Huang*[87]:

– Does the measure strike *a fair balance* between competing interests, i.e. the individual's rights and the interests of the community? This means that the impact of the measure on the individual's rights must stand in fair proportion to the benefits of the measure in the light of the pursued aim (also called "proportionality *sensu stricto*").

Although the content of the proportionality principle has not always been consistent, it now seems generally accepted that the proportionality test in UK domestic law comprises the above four questions[88]. Therefore, this test will probably be the one that must be taken into account when assessing the proportionality of the order to leave so that it complies with the Convention rights.

It is nevertheless sometimes difficult in practice to distinguish the seemingly independent criteria of the domestic proportionality test from one another[89]. Consequently, as articulated by Gordon, the entire proportionality review *de facto* requires no more than a "very general scrutiny of means and ends"[90], a balance to which also Section 35(3) of the ACPA expressly refers, as mentioned above. However, it is important to point out that the fourth criterion of the above-mentioned proportionality test also requires taking into account the impact of the adopted measure

Banning Orders 'on Complaint' under the principle of proportionality (2005) 3 ESLJ 1, p. 4. Note, however, that imposing the least intrusive measure is not always required in the ECofHR's case law, as mentioned above.

84 *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 A.C. 167, para. 19 (joint opinion).

85 *Daly v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 A.C. 532, para. 27 (Lord Steyn); *R v Shayler* [2002] UKHL 11; [2003] 1 A.C. 247, para. 61 (Lord Hope of Craighead); *A & Ors v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68, para. 30 (Lord Bingham of Cornhill).

86 *Hickman, "The substance and structure of proportionality"*, fn. 31 above, p. 701.

87 *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 A.C. 167. See also *Hickman, "The substance and structure of proportionality"*, fn. 31 above, p. 713.

88 See e.g. *Nicklinson* [2014] UKSC 38; [2015] A.C. 657, para. 80; *Bank Mellat v HM Treasury* [2013] UKSC 39; [2013] H.R.L.R. 30, para. 20 and *R (Aguilar Quila) v The Secretary of State for the Home Department* [2012] 1 A.C. 621, para. 45. See also e.g. *Hickman, "The substance and structure of proportionality"*, fn. 31 above, p. 713 and A.D.P. Brady, *Proportionality and Deference…*, p. 7.

89 As also stated by Lord Sumption in *Bank Mellat v HM Treasury* [2013] UKSC 39; [2013] H.R.L.R. 30, para. 20. See also R. Gordon QC, *Two dogmas of Proportionality* (2011) 16(3) J.R. 182, 184, para. 14.

90 R. Gordon QC, *Two dogmas of Proportionality…*

for the individual's rights. Therefore, as to the UK direction to leave, UK courts, as well as the constable in uniform who imposes this direction, must not only balance the direction and the pursued aim of maintaining public order. They must also take into account the consequences of the direction for the individual's fundamental rights, more specifically the right to freedom of movement as guaranteed via the Convention rights. Hence, the UK proportionality principle primarily comprises an "aims-means-consequences" test, which is also apparent in the ECofHR's case law, as discussed above.

However, it is not because the above "aims-means-consequences" test is to be considered as the established domestic proportionality test, or at least with regard to the Convention rights, and that it is the test to which section 35(2) of the ACPA refers, albeit partly, that this is the only test that is applicable to the direction to leave. After all, UK courts and the competent constable must also take into account the requirements resulting from Article 6 of the ECHR, more specifically the required distinction between criminal and non-criminal matters. This distinction is increasingly taken into account by UK courts, as discussed above. However, up until now, this distinction has been primarily made with regard to the applicable procedural safeguards guaranteed in Article 6 of the ECHR[91] but not as regards the different content of the proportionality principle, which presumably results from that Article as well. Thus, UK courts do not appear to make a similar distinction as that present in the Belgian Council of State's case law, with regard to the applicable proportionality test in the light of Article 6. They seem to apply only the established "aims-means-consequences" test, at least in respect of the Convention rights.

In my opinion, though, it might be possible that, to be in accordance with Article 6 of the ECHR, UK courts must take into account the nature of the measure. It can be argued that they should make a similar distinction as the one present in the Belgian Council of State's case law and distinguish between the applicable proportionality test to punitive measures and the test applicable to preventive measures. If the measure is to be considered as punitive within the meaning of Article 6 of the ECHR (i.e. a criminal charge), it appears from the ECofHR's case law that it must meet the criminal "means-facts" test, which is not applicable to mere preventive measures. As to the UK direction to leave, it is primarily regarded as a "civil", i.e. non-criminal measure *under UK domestic law*, so that the criminal "means-fact" test is not applicable. However, this does not prevent UK courts from deciding in a particular case that the direction to leave is in reality imposed as a criminal charge within the meaning of Article 6 of the

91 See e.g. *Gough and Smith v Chief Constable of Derbyshire* [2002] Q.B. 1213, paras. 89–90 (criminal standard of proof) and *Secretary of State for the Home Department v MB* [2007] UKHL 46, paras. 23–24 (right to a fair hearing).

ECHR, as discussed above. If this is the case, the imposed direction to leave should meet the criminal "means-facts" test.

Moreover, the distinction between criminal and non-criminal measures is not the only distinction which UK courts, as well as the constable who imposes the direction to leave, must take into account. The ECofHR's case law also distinguishes between civil and non-civil matters *in view of Article 6 of the ECHR*. As discussed above, the classification as civil within the meaning of Article 6 has been already confirmed in UK case law with regard to certain freedom-restricting public order powers. Given the fact the direction to leave is also a public order power restricting the individual in his or her free movement, it is not unconceivable that it is to be regarded as civil in view of Article 6. If so, national authorities may be required to apply the criminal "means-facts" test as well, since this test is also applicable to civil matters.

As a result, with regard to the UK direction to leave, it does not suffice that national authorities take into account its freedom-restricting nature and apply the established "aims-means-consequences" test, resulting from the ECofHR's case law and as further developed by UK courts. They must also take into account the civil and/or criminal nature of the direction imposed for the purposes of Article 6 of the ECHR, in order to determine whether the criminal "means-facts" test is also applicable, in addition to the established proportionality test at the domestic level. As a result, if the direction to leave is civil and/or criminal in view of Article 6, national authorities will have to take into account multiple proportionality tests and thus criteria at the same time, namely the established "aims-means-consequences" test as well as the criminal "means-facts" test.

4. Concluding remarks

This contribution aimed to provide a first exploratory analysis of the criteria that national authorities have to take into account when considering the proportionality of public order measures restricting the individual's right to freedom of movement within the territory of a particular State, such as area-based restrictions.

To be compliant with the right to freedom of movement, as guaranteed in Article 2 of the FAP or via other fundamental rights, area-based restrictions must stand in fair proportion to the public order aim pursued and its consequences for the individual's free movement (the "aims-means-consequences" test). Additionally, if the area-based restriction is to be regarded as civil and/or criminal within the meaning of Article 6 of the ECHR, it appears at least implicitly from the ECofHR's case law with regard to the right to a court with full jurisdiction that it must also stand in fair proportion to the individual's misbehaviour, i.e. the facts (the "means-facts" test). This

would in turn imply that there are multiple proportionality tests and thus different criteria stemming from the European human rights level.

Nevertheless, the ECofHR's case law is still not explicit on this point. Some inspiration can be found at national level. The Belgian Council of State takes into account the nature of the measure imposed to appropriately determine the applicable proportionality test. It applies the criminal "means-facts" test to only punitive measures, whereas an "aims-means-consequences" test, similar to the one at European level, is applied to those that are rather preventive in nature. I argue that this appears to be in line with Article 6 of the ECHR and that national authorities should take into account the (non-)punitive nature of the measure to appropriately determine the applicable proportionality test. Additionally, as it appears from UK case law, national authorities should also be aware that freedom-restricting public order powers, such as area-based restrictions, are likely to be considered as (also) civil within the meaning of Article 6. In this case, the criminal "means-facts" test is applicable as well, in addition to the domestic proportionality test.

This, in turn, entails that national authorities are not just faced with various proportionality tests and thus different criteria to be applied resulting from European level, as area-based restrictions may not only interfere with the right to free movement in Article 2 of the FAP or via other fundamental rights, but also with Article 6 of the ECHR. National authorities are also confronted with multiple proportionality tests and thus criteria that they have to apply, due to the multi-level legal framework in which they act, i.e. the national level *and* the European level.

As a result, additional research is necessary to further clarify the different proportionality tests and their subsequent criteria, both from national and European levels, in order to examine whether and to what extent these multiple tests are similar or should be similar. This would lead to a clearer proportionality review of freedom-restricting measures imposed to maintain public order. A clearer proportionality review in turn fosters a more clear and general assessment framework for such freedom-restricting public order powers, which is indispensable for striking a good balance between the need to maintain public order and our fundamental rights and freedoms, especially the right to freedom of movement.

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Abstract

This contribution aims to provide a first exploratory analysis of the criteria that must be taken into account by national authorities when considering the proportionality of public order measures restricting the individual's fundamental right to freedom of movement, such as area-based restrictions. The content of the proportionality principle as regards area-based restrictions is not always clear, in particular at European human rights level, while it is an important condition that these restrictions be compatible with the right to freedom of movement. To that end, this article first gives a brief overview of the content of this principle at European level. In order to find some inspiration, it then compares it with the interpretation of this principle at national level, more specifically Belgium and the United Kingdom, where new forms of area-based restrictions have been introduced recently. The case law of the Belgian Council of State is an interesting case to examine since the Council applies a different proportionality test depending on the legal classification of the measure imposed. The contribution proceeds with an analysis of the proportionality principle in the UK case law, where it is a relative newcomer used instead of the traditional "Wednesbury unreasonableness" test in cases that fall under the European Convention on Human Rights.

Keywords: area-based restrictions, proportionality principle, public order

Legitymacja ograniczeń terytorialnych wydanych w celu utrzymania porządku publicznego: wypełnienie treścią zasady proporcjonalności z europejskiej perspektywy prawnej

Streszczenie

Niniejszy artykuł ma na celu zaproponowanie pierwszej analizy badawczej kryteriów, jakie muszą być uwzględnione przez organy krajowe przy rozpatrywaniu przez nie proporcjonalności środków w zakresie porządku publicznego ograniczających podstawowe prawo jednostki do swobodnego przemieszczania się, takich jak ograniczenia terytorialne. Treść zasady proporcjonalności w zakresie ograniczeń terytorialnych nie zawsze jest jasna, zwłaszcza w obszarze praw człowieka w Europie, zaś istotnym warunkiem jest zgodność przedmiotowych ograniczeń z prawem swobodnego przemieszczania się. W związku z powyższym niniejszy artykuł najpierw oferuje zwięzły przegląd treści przywołanej zasady w wymiarze europejskim. W poszukiwaniu inspiracji autorka następnie zestawia ją z wykładnią przedmiotowej zasady na gruncie krajowym,

a konkretnie w Belgii oraz Zjednoczonym Królestwie, gdzie ostatnio wprowadzono nowe formy ograniczeń terytorialnych. Ciekawy przypadek stanowi orzecznictwo belgijskiej Rady Stanu, która stosuje inny test proporcjonalności w zależności od klasyfikacji prawnej nałożonego środka. W ostatniej części artykułu zaprezentowano analizę zasady proporcjonalności w orzecznictwie brytyjskim, gdzie od niedawna zastępuje ona „test Wednesbury w zakresie nieracjonalności" w sprawach podlegających Europejskiej Konwencji Praw Człowieka.

Słowa kluczowe: ograniczenia terytorialne, zasada proporcjonalności, porządek publiczny